

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

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In re:)	Chapter 11 Cases
)	
TOUSA, INC., <u>et al.</u> ,)	Case No. 08-10928-JKO
)	
Debtors.)	Jointly Administered
)	

**RESPONSE OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF TOUSA, INC., ET AL., TO LIMITED
OBJECTION BY CITICORP NORTH AMERICA, INC., AS ADMINISTRATIVE
AGENT, TO DEBTORS’ MOTION FOR AUTHORITY TO USE CASH COLLATERAL**

The Official Committee of Unsecured Creditors (the “Committee”) of TOUSA, Inc., et al. (collectively, the “Debtors”), by and through its undersigned counsel, hereby files this response (the “Response”) to the Limited Objection by Citicorp North America, Inc., as Administrative Agent, to Debtors’ Motion for Authority to Use Cash Collateral [D.E. #2332] (the “Limited Objection”).¹ In support of this Response, the Committee respectfully submits as follows:

RESPONSE

1. By the Second Cash Collateral Motion, the Debtors seek entry of a final order authorizing the use of the Prepetition Secured Lenders’ Cash Collateral. At the interim hearing on the Second Cash Collateral Motion (the “Interim Hearing”), the First Lien Agent consented to the entry of the Interim Order. The Interim Order permitted the continued use of Cash Collateral to, among other things, compensate the Committee’s professionals for the prosecution of claims and causes of action against, among others, the Prepetition Secured Lenders (the “Committee”

¹ The Limited Objection is filed in response to the Debtors’ Second Motion for Authority to Use Cash Collateral [D.E. #2022], as supplemented [D.E. #2216 and 2231] (the “Second Cash Collateral Motion”). All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Second Cash Collateral Motion or the Limited Objection, as applicable.

Action”). By its Limited Objection, the First Lien Agent has seized upon the provision of the Interim Order allowing the First Lien Agent to revisit the terms of the Debtors’ use of Cash Collateral every thirty days and conditioned its further consent to the use of Cash Collateral on the elimination of funding for the Committee Action. *See* Interim Order at 11.²

2. The single issue upon which the Limited Objection is predicated -- funding of the Committee Action -- has already been addressed and decided by this Court and affirmed by the District Court. *See* Transcript of Hearing, June 10, 2008 at 271:13-18 (“I told you all before that I don’t believe professionals should be engaged in the business of funding a reorganization and I won’t approve a cap on the litigation expenses or the other expenses incurred by the creditors’ committee”); Interim Order Affirming Cash Collateral Order (S.D. Fla. January 5, 2009 Case No. 08-61317). Nevertheless, the First Lien Agent is seeking to use its perceived control over the Debtors’ cash to prevent the continued prosecution of the Committee Action and shield itself from well-founded challenges to the Prepetition Secured Lenders’ claims and liens. The First Lien Agent cannot credibly argue that the continued payment of the Committee’s fees in connection with the Committee Action will cause a material reduction to the adequate protection package it is otherwise prepared to accept. Rather, its Limited Objection is a thinly veiled attempt to obtain leverage over the Committee and the upper hand in settlement negotiations related to the Committee Action. The First Lien Agent’s actions should not be countenanced by this Court.

² The Committee respectfully submits that the Debtors’ use of Cash Collateral should not be subject to review every thirty days and any order entered approving the Second Cash Collateral Motion should be for a reasonable duration. As the Prepetition Secured Lenders reserve the right to seek to terminate the use of Cash Collateral or request additional forms of adequate protection at any time, a longer term will not prejudice the Prepetition Secured Lenders’ interests.

3. The Committee believes that the Limited Objection is the First Lien Agent's reaction to the Committee's rejection of a "take it or leave it" settlement proposal recently made by the First Lien Lenders. While the Committee will continue to work in good faith with all parties in interest to bring the Debtors out of chapter 11 as soon as possible, it cannot achieve this result by abdicating its fiduciary duties and agreeing to a settlement of the Committee Action that does not provide unsecured creditors with an appropriate recovery given the strength of the Committee's claims.³ Indeed, the Committee has proposed multiple alternatives for the Debtors to emerge from chapter 11 while the Committee Action remains pending. The First Lien Lenders, however, remain unreasonably steadfast in their position that the only avenue to reorganization to which they will consent is one where the Committee Action is settled (at least as to the First Lien Secured Parties) on terms they dictate. It is the First Lien Lenders' actions, not those of the Committee, that are preventing the culmination of these chapter 11 cases.

A. Payment of the Committees' Professionals' Fees is a Valid Use of Cash Collateral

4. The Bankruptcy Code contains express provisions authorizing an official committee to retain the professionals of its choice, and to have such professionals compensated by the debtor's estate. *See* 11 U.S.C. §§ 330, 1103. These provisions exist to ensure that there is an adversary process in which the official committee can, among other things, (a) adequately monitor the debtor's actions; (b) guarantee the debtor's compliance with the Bankruptcy Code; and (c) fully participate in the debtor's chapter 11 case to acquit its statutory and fiduciary obligations in accordance with Bankruptcy Code sections 1102, 1103 and 1109. Attempts by secured lenders to limit the reasonable compensation of a committee's professionals will inhibit the committee's ability to acquit its fiduciary duties and should not be sanctioned. *In re Tenney*

³ Indeed, through discovery, the Committee has uncovered evidence that only strengthens the Committee's claims

Vill. Co., Inc., 104 B.R. 562, 568-69 (Bankr. D.N.H. 1989) (holding in denying financing terms that lenders' control of debtors' legal fees unacceptably limited the ability of debtor to bring actions against the postpetition lender, creating an economic incentive to avoid bringing such actions in disregard of its fiduciary duties toward the estate); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (stating that "failure to provide a reasonable sum for professionals has, in other cases before this Court, left estates, creditors' committees and trustees without the assistance of counsel and the Court without the adversary system contemplated by Congress"). While the First Lien Agent is correct that the successful resolution of the Committee Action is a prerequisite for unsecured creditors to obtain a material recovery on account of their claims, it does not follow that the Committee's professionals have acted or will act recklessly in connection with the incurrence of fees related to prosecution of the Committee Action. Indeed, upon the successful prosecution of the Committee Action, it will be the unsecured creditors of these estates that will have funded the litigation.

5. The First Lien Agent has posited that the Committee can compensate its professionals by (i) relying on an administrative claim; (ii) seeking financing subordinate to the Prepetition Secured Lenders' claims; or (iii) negotiating a contingency arrangement with its counsel. None of these alternatives are viable because they would require the Committee's professionals to fund the litigation or place control of the litigation in the hands of a non-fiduciary. Moreover, the First Lien Agent's alternatives would have the Committee's professionals take the risk of the outcome of the litigation (and these chapter 11 cases) while the Prepetition Secured Lenders' professionals continue to be compensated by the estates. The costs incurred by the Committee in connection with the Committee Action are no different than any

against the Prepetition Secured Lenders.

other reasonable administrative expense that is required to be paid out of cash collateral. *See In re City Mattress, Inc.*, 174 B.R. 23, 26-7 (Bankr. W.D.N.Y. 1994) (finding that “[n]othing in the Bankruptcy Code requires counsel to shoulder the financial risks of a reorganization. To the extent that a debtor may use cash collateral, that authorization is without prejudice to any particular class of administrative expense. The estate is without justification to treat allowed professional fees differently than any other cost of operation.”). Accordingly, use of Cash Collateral to pay fees and expenses incurred by the Committee in connection with the prosecution of the Committee Action is appropriate.

B. The Committee Action Has Been Pursued Efficiently and Effectively

6. In support of its Limited Objection, the First Lien Agent portrays the Committee as being unreasonable and inefficient in the prosecution of the Committee Action. The First Lien Agent, however, cannot credibly argue that the Committee’s claims and causes of action are frivolous, or that the Committee has failed to act expeditiously in pursuing the litigation.

7. First, contrary the First Lien Agent’s assertions, the Committee is not to blame for the extension of the litigation schedule. The extension of the schedule, which was not opposed by the First Lien Agent, resulted from, among other things, (i) the volume of documents produced by the First Lien Agent and other defendants and their failure to make the rolling production called for by the Case Management Order (Adversary Proceeding No. 08-01435 [D.E # 3]) and (ii) a one month of extension demanded by the First Lien Agent (over the Committee’s objection) for a “supplemental fact discovery period” after completion of expert discovery.

8. Second, the cost of the litigation to date has, in large part, been the result of actions by other parties. Indeed, since the commencement of the Committee Action, the Committee has been required to devote substantial time to its successful defense of motions to

dismiss made by the Second Lien Lenders and both groups of Transeastern Lenders. The Committee was also required to expend time and effort in connection with the motions to dismiss filed by the First Lien Agent on behalf of the First Lien Revolver Lenders, which were only granted, in part.⁴

9. Third, the largest litigation cost incurred by the Committee thus far related to the review of over one million pages of documents produced by the First Lien Agent without any attempt to minimize costs through implementation of a more efficient and consensual process. Additional expense results from the sheer number of parties involved in the litigation. As noted by the First Lien Agent, there may be as many as 70 depositions taken in connection with the Committee Action. Putting aside the depositions of ten division presidents that will last only a couple of hours each, the defendants in the Committee Action have indicated an intent to depose more parties than the Committee. All parties, however, have indicated that they will likely decrease their lists of deponents as more information becomes available.

10. In sum, the Committee Action is a valid and appropriate exercise of the Committee's statutory mandate, and the First Lien Agent's efforts to override such mandate should not be approved.

C. The Prepetition Secured Lenders Are Adequately Protected

11. The Second Cash Collateral Motion contemplates the continued provision of adequate protection to the Prepetition Secured Parties notwithstanding the disputed nature of their claims. The adequate protection to be provided includes current payment of interest to the First Lien Lenders, replacement liens, the Adequate Protection Claims, and payment of the

⁴ The portion of the First Lien Revolver Lenders' motion to dismiss that was granted by the Court is currently on appeal.

Prepetition Secured Parties' advisors' fees and expenses. These forms of adequate protection, together with amounts already paid (including the \$175 million contingent pay-down of the First Lien Debt), provide sufficient adequate protection to the Prepetition Secured Parties.

12. Moreover, where a secured creditor's claims and liens are disputed, the challenge to such claims and liens must be considered in evaluating the measure of adequate protection required. *See In re Express One Int'l, Inc.*, No. 02-41981, 2002 Bankr. LEXIS 1952, at *12 (Bankr. N.D. Tex. Apr. 16, 2002) (finding that "the Court must take into account what is being protected. If a creditor holds a lien which is subject to legitimate attack, the possibility of the lien's avoidance may be considered in balancing the creditor's right to protection against the debtor's need to use the collateral."). Given that that Prepetition Secured Parties' claims and liens are disputed, the adequate protection that has been and will continue to be provided to the Prepetition Secured Parties adequately protects their interests.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Committee respectfully requests that the Court (i) overrule the Limited Objection; (ii) find that the Prepetition Secured Lenders are adequately protected; (iii) authorize the Debtors' continued use of cash collateral on terms materially consistent with the Interim Order; and (iv) grant the Committee such other relief as this Court deems just, proper, and equitable.

Dated: January 8, 2009

Respectfully submitted,

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

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-and-

We hereby certify that the undersigned attorneys are appearing pro hac vice in this matter pursuant to Court orders dated February 27, 2008 and March 3, 2008.

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